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In the
SUPREME COURT OF THE UNITED STATES
October Term 1998

CHERYLE ANN SCHEERER, *et ux.*,
Petitioners,

vs.

HARDEE'S FOOD SYSTEMS, INC.,
Respondent.

Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Under Fed. R. Evid. 602 and Fed. R. Evid. 701 may a lay witness offer opinion testimony, or be compelled to offer opinion testimony, that the cause of a slip and fall accident in a restaurant parking lot was the slick shoes worn by the plaintiff, where the witness testifies she did not see the fall, and that she never saw the bottoms of the plaintiff's shoes, particularly where this testimony is the sole testimony on causation offered by the restaurant?

LIST OF PARTIES

Petitioners

Cheryle Ann Scheerer
John Scheerer

Respondent

Hardee's Food Systems, Inc.

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Rules

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit is reported at 148 F.3d 1036 [Appendix 1]. Prior opinions of the Eighth Circuit in this case may be found in *Scheerer v. Hardee's Food Systems, Inc.*, 16 F.3d 272 (8th Cir. 1994) (*Scheerer I*), and *Scheerer v. Hardee's Food Systems, Inc.*, 92 F.3d 701 (8th Cir. 1996) (*Scheerer II*). The Order of the District Court upon which this appeal is based appears at Appendix 9.

JURISDICTION

The judgment of the United States Court of Appeals for the Eighth Circuit was entered on July 9, 1998. Petitioners filed a timely Petition for Rehearing, which was denied on August 14, 1998 [Appendix 10]. This petition is filed within ninety days of that date. This Court has jurisdiction to review the judgment on a petition for a writ of certiorari pursuant to 28 U.S.C. §1254(1).

RULES INVOLVED

Federal Rule of Evidence 602
(Lack of Personal Knowiedge)

A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness had personal knowledge of the matter. Evidence to prove personal knowledge may, but need not, consist of the witness' own testimony. This rule is subject to the provisions of rule 703, relating to opinion testimony by expert witnesses.

Federal Rule of Evidence 601
Opinion Testimony by Lay Witnesses

If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness' testimony or a determination of a fact in issue.

STATEMENT OF THE CASE

On June 28, 1989, Mr. and Mrs. Scheerer went to the Hardee's restaurant in Lee's Summit, Missouri, which they had visited before. They parked in the east parking lot and entered the restaurant through the east entrance, walking through parking spaces adjacent to the restaurant to do so. They were inside about thirty minutes, and they exited through the same door. There was a car parked in the space they had previously walked through. Mrs. Scheerer walked past the car, and at the rear, as she started to turn to go to the Scheerer vehicle, she put her left foot down, it slid, and she went up in the air and came down on her right knee with all her body weight. At the time of the accident she was wearing black patent leather pumps, which were approximately a year old and had been worn quite a few times. Mrs. Fann (formerly Mohorich) came to help her. An ambulance eventually came and took Mrs. Scheerer to a hospital for treatment.

In 1991, Mr. and Mrs. Scheerer filed suit against Hardee's Food Systems, Inc., in the Circuit Court of Jackson County, Missouri. Hardee's then removed it to the United States District Court for the Western District

of Missouri, on the basis of diversity jurisdiction under 28 U.S.C. §1332, as Mr. and Mrs. Scheerer are citizens of Missouri and Hardee's is a corporate citizen of North Carolina. state. The District Court initially granted summary judgment in favor of Hardee's because Mr. and Mrs. Scheerer could not say of their own personal knowledge why Mrs. Scheerer fell. The Eighth Circuit reversed and remanded for trial, *Scheerer v. Hardee's Food Systems, Inc.*, 16 F.3d 272 (8th Cir. 1994) (*Scheerer I*). Following a trial with a verdict in favor of Hardee's the Eighth Circuit again reversed, and remanded for a new trial, holding that admission of the Hardee's incident report was prejudicial error. *Scheerer v. Hardee's Food Systems, Inc.*, 92 F.3d 701 (8th Cir. 1996) (*Scheerer II*). After the second trial, with a verdict in favor of Hardee's, the Eighth Circuit affirmed, *Scheerer v. Hardee's Food System, Inc.*, 148 F.3d 1036 (8th Cir. 1998), and on August 14, 1998, denied the Scheerers' Petition for Rehearing and for Rehearing En Banc. This Petition for a Writ of Certiorari follows.

ARGUMENT

"The law requires that he who deposes to a fact should have the means of knowing it." *State v. Allen*, 1

Hawks 9 (N.C. 1820).

That statement, cited with approval in *Joy Manufacturing Company v. Sola Basic Industries, Inc.*, 697 F.2d 104, 111 (3d Cir. 1982) is the principle at issue here. Mrs. Fann testified in the *Scheerer II* trial that she had made a comment about Mrs. Scheerer wearing black patent leather shoes, and she testified she did not see the bottoms of Mrs. Scheerer's shoes that day. She testified again in *Scheerer III* that she did not see the bottoms of Mrs. Scheerer's shoes. [Lodging at 59.] She testified she wasn't looking around to find out why Mrs. Scheerer fell, but was concerned about helping Mrs. Scheerer.

Mrs. Fann had no means of knowing the facts, *Allen*, *supra*, yet the District Court in both trials compelled her testify that it was her "opinion" that Mrs. Scheerer fell because of Mrs. Scheerer's "slick shoes."

It is common knowledge, based on common experience, that shoes which have been worn (and these had been worn for approximately a year) may for one reason or another have slick soles or heels. The person who has worn the shoes may obviously testify as to whether the bottoms were slick because he or she has

experience in walking in the shoes. *But the only way any other human being can say the bottom of a shoe is slick is if that person actually sees or touches the bottom of the shoe.*

Mrs. Fann unequivocally stated she never saw the bottom of Mrs. Scheerer's shoes: "Did you ever look at the bottom of those shoes?" "No." [Lodging at 59.] Yet she was still forced to testify Mrs. Scheerer fell because of slick shoes—and Mrs. Fann's testimony through cross-examination was the sole evidence presented by Hardee's on the issue of causation.

In *Scheerer v. Hardee's Food Systems, Inc.*, 92 F.3d 702 (8th Cir. 1996) (*Scheerer II*), the Eighth Circuit ruled that admission of the Hardee's incident report in the first trial was reversible error. [A copy of the incident report appears in the Lodging at 45.] Prior to the second trial, Plaintiffs filed a motion in limine seeking exclusion not only of the physical report itself, but of its contents as well; the motion and supporting documentation included trial transcript excerpts from *Scheerer II*. [Lodging at 1-45, *Scheerer II* excerpts at Lodging 21 to 37.]

In denying the motion in limine, the District

Court noted Hardee's representation it was going to seek to create a foundation for admission of the report other than as a business record, and the trial court was thus willing to give Hardee's an opportunity to do so. [Lodging at 46-47.] Several days later, the District Court entered an order *sua sponte*, requiring in part that Hardee's "not discuss its incident report in voir dire, opening statement, or any other time during the trial without prior approval from the court obtained outside of the hearing of the jury." [Lodging at 48-49.]

At the trial Hardee's made no effort to lay a foundation to admit the incident report; instead, it managed to get in through the "back door" (cross-examining Mrs. Fann about her purported conclusions about what caused the slip and fall) what it could not get in through the "front door" (admission of the incident report).

Defense counsel elicited the testimony of Mrs. Fann that she had no trouble walking on "that surface" (Mrs. Fann was wearing tennis shoes). [Lodging at 65.] The question, however, was designed to and did in fact create the impression Mrs. Fann was walking on the *same* surface Mrs. Scheerer stepped on at the time of her fall, when there was no evidence to support that infer-

ence. After other questions about whether Mrs. Fann had gotten wet while waiting with Mrs. Scheerer for the ambulance, Mrs. Fann pointing out that she wouldn't necessarily have been wet if Mrs. Scheerer's clothes had already absorbed whatever water there was [Lodging at 68], defense counsel asked: "And you looked around and you said it must have been your slick shoes, didn't you?" [Lodging at 69.]

The Scheerers' counsel objected on the basis that the question violated the trial court's order by not raising the issue of the subject matter of the incident report that the cause of the fall was Mrs. Scheerer's slick shoes, outside of the hearing of the jury. *Id.* He also pointed out that in *Scheerer I* she said she had never made that statement, and had never made any observation in that regard. *Id.* Defense counsel's response was the one anticipated by Plaintiffs' motion in limine: "I didn't mention the incident report at all, Judge. I didn't say a word about it." [Lodging at 69-70.] The following colloquy then occurred out of the hearing of the jury:

> THE COURT: Do you have a statement that you relied upon for her response in this matter, other than the incident report?

MR. HASTY: I have her testimony under oath and she says that's what she said.

THE COURT: Under oath when and where?

MR. HASTY: At trial.

MR. PICKETT: Show it to us relating to that phraseology, sir.

MR. HASTY: Sure.

MR. PICKETT: Your honor, there is absolutely no foundation that she looked at the bottom of the shoes—

MR. HASTY: It is not for that purpose.

THE COURT: If she said it, he has a right to ask it. Objection is overruled.

MR. PICKETT: Just a minute, if I may, Your Honor. Just because a person says something doesn't mean, if they're unqualified, they get to say it before the jury. You have excluded Keith Vidal as an expert from his conclusion. She can't say without even seeing the bottom of the shoes.

THE COURT: This is a subject of redirect, Mr. Pickett.

MR. PICKETT: Thank you.

[Lodging at 70.]

After returning to open court, defense counsel

continued to question Mrs. Fann about the "slick shoes," despite knowing from the first trial she had no way to know if the shoes were slick or not, and stating to the trial court that he was only asking for her "observations." [Lodging at 73.]

Defense counsel represented to the trial court that the basis for questioning Mrs. Fann about the "slick shoes" comment was because she had previously testified to that fact under oath in the prior trial. [Lodging at 70.] Yet that is not true.

Read as a whole, Mrs. Fann never once testified in *Scheerer II* that she was the source of the "slick shoes" comment on the incident report, especially since the conversation related above was solely between Mrs. Scheerer and Mrs. Fann. Mrs. Fann only remembered commenting that Mrs. Scheerer was wearing black patent leather shoes, and it is a plain and simple fact of every day life that no matter how shiny and slick the upper part of a shoe might be, the mere fact that the top is shiny and slick does not automatically mean that the bottom is slick as well. Yet Mrs. Fann, despite her denials about having made any observation whatsoever about the cause of the fall, was forced by the trial court

in *Scheerer II* to answer "yes" or "no" to whether she observed any cause for the fall other than slick shoes.

It is undisputed that Mrs. Fann did not see Mrs. Scheerer fall. There is nothing in the record which affirmatively indicates that Mrs. Fann was paying any attention to her surroundings, rather than to Mrs. Scheerer while waiting for the ambulance. There is nothing in the record to show that she made any observations which could have led her to conclude anything about the cause of the fall. There is nothing in the record to demonstrate how the supposed "slick shoes" comment got into the incident in the first place, since the author of the incident report was not called to testify. There is nothing in the record to demonstrate that if Mrs. Fann was the purported source of the incident report comment, that she did not merely comment on the fact Mrs. Scheerer was wearing patent leather shoes, and the Hardee's employee then "translated" that into the "slick shoes" notation as to the cause of the fall. There was clearly no factual basis grounded in Mrs. Fann's perceptions or observations at the time of the event, from which she could have concluded *anything* about why Mrs. Scheerer fell.

Defense counsel persuaded the trial court in

Scheerer III to allow him to question Mrs. Fann about the "slick shoes" on a false representation that Mrs. Fann had previously testified to that conclusion. The trial court merely accepted his word, without requiring any proof as required by Rules 602 and 701 of the factual basis for her "conclusion."

What happened in the *Scheerer III* trial is that a lay witness was allowed, or more accurately, forced to testify as to her "opinion" on the ultimate issue in this case—the cause of Mrs. Scheerer's slip and fall—in violation of both Rules 602 and 701.

The Eighth Circuit's opinion affirming the trial court conflicts not only with numerous opinions of the Eighth Circuit itself construing those Rules, but with numerous opinions of other Circuit Courts of Appeals, and therefore offers a basis under Supreme Court Rule 10(a) for granting this petition for a writ of certiorari.

In *United States v. Lyon*, 567 F.2d 777, 783-784 (8th Cir. 1977), the Eighth Circuit said, "[Rule 602] excludes testimony concerning matter the witness did not observe or had no opportunity to observe." In the context of identification evidence, the Third Circuit has said, "...what the witness represents as his knowledge

must be an impression derived from his own senses. And this impression must be gauged by the geographic proximity of the witness to the event, the length of time involved, and the existence of proper conditions for the exercise of powers of observation and perception." *United States v. Barber*, 442 F.2d 517, 536 (3d. Cir. 1971). The Third Circuit later held that this analysis was applicable in Rule 701 determinations of whether a witness' opinion is rationally based on his perception, saying, "The court is in essence requiring that the best evidence available—first-hand knowledge versus second-hand knowledge—be presented to the jury for use in its deliberation." *Joy, supra*, at 111. In *Swajian v. General Motors Corporation*, 916 F.2d 31, 35 (1st Cir. 1990), the First Circuit said:

> For opinion testimony of a layman to be admissible three elements must be present. First, the witness must have personal knowledge of the facts from which the opinions is to be derived. Second, there must be a rational connection between the opinion and the facts upon which it is based. Third, the opinion must be helpful in understanding the testimony or determining a fact in issue.

All three elements are missing from Mrs. Fann's

testimony in *Scheerer III*. Mrs. Fann did not see the fall; she wasn't paying attention to the surroundings when she got to Mrs. Scheerer because she was trying to help Mrs. Scheerer, and she never saw the bottom of Mrs. Scheerer's shoes, albeit she did recognize them as being black patent leather shoes. To testify that a fall occurs because of a slick surface, a witness under these Rules must have personal knowledge that the surface was in fact slick. Mrs. Fann has no such knowledge and therefore the first element is missing.

The "rational connection" element means that there has to be a logical correlation between the inference drawn or opinion form based on the observed facts. In a slip and fall case, if a witness observed a floor was slick with fresh wax and saw someone fall a few seconds later, then there would be a rational connection between the witness' observations (floor slick with wax) and an opinion (the fall was caused by the slick floor). Mrs. Fann didn't see the fall. Mrs. Fann didn't see the parking lot surface where Mrs. Scheerer fell *before* the fall. Mrs. Fann didn't see the particular spot at which Mrs. Scheerer fell *after* the fall. Mrs. Fann never saw the bottoms of Mrs. Scheerer's shoes. Mrs. Fann, there-

fore, had no on-the-spot, first-hand observational knowledge of the two crucial elements in a "slick surface" slip and fall situation: (a) whether the surface on which the fall took place was itself slick and (b) whether the bottoms of the shoes worn by the person who fell were slick. Absent such knowledge, Mrs. Fann had no facts on which to base an opinion or draw an inference, and the second element is therefore missing.

The third element of helpfulness is also missing. Mrs. Fann could have merely testified that she observed A, B and C, and that she did not observe X, Y or Z. Taken with the other testimony the jury heard they could have drawn their own conclusions as to the cause of the fall, which was obviously the critical element in this case. There was simply no need for a short-hand rendition of Mrs. Fann's observations (or lack thereof) in the form of an "opinion" because even without Mrs. Fann's "opinion" the jury would have been capable of reaching its own conclusion.

The *Scheerer III* opinion conflicts with the following opinions of the Eighth Circuit: *Crimm v. Missouri Pacific Railroad Company*, 750 F.2d 703, 710 (8th Cir. 1984) (lay opinion that age was a factor in plain-

tiff's termination properly excluded where the witness had no direct personal knowledge of the reasons for the discharge, although having worked as plaintiff's assistant for fifteen years); *Burlington Northern Railroad Company v. Nebraska*, 802 F.2d 994, 1004-1005 (8th Cir. 1986) (error to exclude railroad executives' lay opinion testimony where the testimony was based on "supervising railroad operations, years of experience in the industry, and review of employee accident reports prepared in the ordinary course of business"); *Hurst v. United States*, 882 F.2d 306, 211-312 (8th Cir. 1989) (lay opinion of private pilot on cause of flood admissible because of personal observations from flying over the flooded area, and thirty-nine years of experience flying over the river to monitor ice jams and floods); *United States v. Lucas*, 898 F.2d 606, 610-611 (8th Cir. 1990) (witness' identification of defendant as the person in a surveillance tape admissible, where she knew defendant's appearance at the time, and his appearance was different at trial); *United States v. Cortez*, 935 F.2d 135, 139-140 (8th Cir. 1991) (error to admit lay opinion testimony of two officers as to the truthfulness of a government witness where they had insufficient contacts

with the witness to form an opinion on his character for truthfulness, although harmless error in the context of the case); *Kemp v. Balboa*, 23 F.3d 211, 213 (8th Cir. 1994) (reversible error to allow lay witness to testify plaintiff failed to pick up his medication from the prison infirmary, where witness had no personal knowledge because she was not on duty on the days in question); *Wactor v. Spartan Transportation Company*, 27 F.3d 347, 351 (8th Cir. 1994) (lay opinion on cause of barge accident admissible because of witnesses' "years of personal experience, their personal inspection of the lockline, their participation with Wactor in the stoppage of the barges, and their positions as the sole eyewitnesses to the wrapping, fouling and breaking of the line"); *Maynard v. Sayles*, 817 F.2d 50 (8th Cir. 1987) (reversible error to exclude opinion testimony on existence of a "code of silence" in the Kansas City, Missouri Police Department, where testimony based on officer's employment experience with the Department, and results to her when she violated that code on one occasion).

Scheerer III conflicts with the following opinions of other Circuits in which Rule 701 was held to permit lay opinion testimony: *Lubbock Feed Lots, Inc. v. Iowa*

Beef Processors, Inc., 630 F.2d 250, 263-264 (5th Cir. 1980) (lay witness allowed to testify he inferred the existence of a business relationship between a Mr. Heller and the defendant based on conduct he personally observed [overheard telephone conversations 4-5 times a day]); *Lightfoot v. Union Carbide Corporation*, 110 F.3d 898, 911-912 (2d Cir. 1997) (lay witness allowed to testify age was a factor in terminating plaintiff because witness worked for defendant for sixteen years, and was intimately involved in the company's operations, with opportunity to observe its decisionmaking process); *Fireman's Fund Insurance Companies v. Alaskan Pride Partnership*, 106 F.3d 1465, 1467-1468 (9th Cir. 1997) (claims adjuster allowed to opine the claim at issue was legitimate and that he was upset when coverage was denied, where no evidence his opinion was not based on his own perceptions); *Williams Enterprises, Inc. v. The Sherman R. Smoot Company*, 938 F.2d 230, 233-234 (D.C. Cir. 1991) (broker allowed to offer opinion on reason for Smoot's insurance premium increase based on his personal knowledge of the "history of Smoot's account and the circumstances surrounding the increase"); *Mattison v. Dallas Carrier Corporation*, 947

F.2d 95, 110-111 (4th Cir. 1991) (lay witness allowed to offer opinion emergency flashers on tractor trailer didn't provide adequate warning under the weather conditions at the time of the accident because she saw accident and saw flashers in operation); *In Re Merritt Logan, Inc.*, 901 F.2d 349, 359-360 (3d Cir. 1990) (company owner allowed to testify to lost profits calculations based on his personal knowledge of his business); *Robinson v. Bump*, 894 F.2d 758, 762-763 (5th Cir. 1990) (lay witness allowed to opine truck driver was in total control of his vehicle until it was struck by a car, because the witness was driving behind the truck and could observe the truck's movement; *Joy Manufacturing Company v. Sola Basic Industries, Inc.*, 697 F.2d 104, 110-112 (3d Cir. 1982) (reversible error to exclude lay opinion testimony as to damages in products liability case, where witness had extensive and detailed day-to-day knowledge of company's operations so as to estimate what percentage of downtime was attributable to product defect); *Teen-Ed, Inc. v. Kimball International, Inc.*, 620 F.2d 399, 403-404 (3d Cir. 1980) (reversible error to exclude lay opinion testimony on lost profits where witness was the company accountant during the time in question).

The opinion in *Scheerer III* conflicts with the following opinions holding Rule 701 excluded opinion testimony: Hart *v. O'Brien*, 127 F.3d 424, 438 (5th Cir. 1997) (witness not allowed to testify as to motivation of other police officers in §1983 arrest case, where witness did not participate in investigation or surveillance, was not present until day of arrest, and did not participate in decision to make the arrest, and therefore there was "no assurance that [the witness] has sufficient personal knowledge to draw a reliable conclusion about the officers' motivations"); *United States v. Riddle*, 103 F.3d 423, 428-429 (5th Cir. 1997) (reversible error to allow a bank examiner who had been offered as a lay/fact witness to go beyond testifying as to conclusions he drew "from observations informed by his own experience," *id.* at 429, based on his review of two bank examinations, into offering opinions on sound banking principles in the abstract); *Gross v. Burggraf Construction Company*, 53 F.3d 1531, 1544 (10th Cir. 1995) (witness not allowed to testify in sex discrimination case about supervisor's opinions of women where witness' testimony based on complaints about supervisor and not on witness' personal knowledge of statements made by supervisor);

Keller v. United States, 38 F.3d 16, 30-31 (1st Cir. 1994) (lay witness not allowed to offer her opinion that plaintiff longshoreman hit his head on a railing before fall which injured him, where she did not see him strike his head, did not see him fall, and did not testify "to any other sensory perception from which one might rationally infer such an impact (*e.g.*, the sound of impact, a sudden jolt or halt in Keller's upward progress, a pre- or post-impact cry, or any outward appearance of a head wound or bleeding.)" *Id.* at 31); *Swajian*, *supra*, at 35-36, (reversible error to allow lay eyewitness to accident to offer opinion on key issue in case—whether right rear wheel separated before rollover began or after it was in progress—where he did not see wheel leave the vehicle and could not recall if wheel was still on during the rollover); *Gorby v. Schneider Tank Lines, Inc.*, 741 F.2d 1015, 1021-1022 (7th Cir. 1984) (not error to exclude opinion of witness that truck driver did everything he could to avoid the accident and that plaintiff could have avoided accident, where witness could only see events from car in opposite lane and had no knowledge of what either driver was doing, nor any special technical knowledge about semi-tanker and pickup trucks in-

volved in the accident).

Scheerer III conflicts with the following opinions applying the personal knowledge requirements of Rule 602: *United States v. Sinclair*, 109 F.3d 1527, 1536 (10th Cir. 1997) (witness allowed to testify because she was present at scene and had opportunity to observe events in question, even if her credibility could be attacked because of drug usage); *M.B.A.F.B. Federal Credit Union v. Cumis Society, Inc.*, 681 F.2d 930, 932 (4th Cir. 1982) (witness/borrower allowed to testify that credit union manager whose negligence was at issue had specific knowledge of purchase price of certain property, even though witness could not state with absolute certainty he had discussed purchase price with the manager); *United States v. Castro*, 89 F.3d 1443, 1454 (11th Cir. 1996) (witness allowed to testify Dade County received federal grants in excess of $10,000 despite being unable to recall specific grant amounts, where he had personal knowledge of grants because of his position as assistant controller of county's finance department during years in question); *Hallquist v. Local 276, Plumbers and Pipefitters Union, AFL-CIO*, 843 F.2d 18, 23-24 (1st Cir. 1988) (Rule 602 standards met where witness testi-

fied only about what she observed on the job site); *Folio Impressions, Inc. v. Byer California*, 937 F.2d 759, 763-764 (2d Cir. 1991) (in copyright infringement case, witness allowed to testify how clothing pattern was created where testimony was based on her general observations and knowledge, resulting from her significant supervisory duties at design studio); *Visser v. Packer Engineering Associates, Inc.*, 924 F.2d 655, 659 (7th Cir. 1990) (en banc) (Rule 602 prohibited consideration of affidavits in summary judgment proceeding where no proof they were "grounded in observation or other firsthand personal experience." The affidavits "must not be flights of fancy, speculations, hunches, intuitions, or rumors about matters remote from experience."); *United States v. Lemire*, 232 U.S. App. D.C. 100, 120, 720 F.2d 1327, 1347 (D.C. Cir. 1983) (witness allowed to provide summary of facts previously testified to by other witnesses, where he had knowledge derived from the transcripts and exhibits); *United States v. Villalta*, 662 F.2d 1205, 1206 (5th Cir. 1981) (reversible error to exclude testimony of a witness present during conversation and events at issue; whether witness' mastery of Spanish [the language of conversation] was sufficient was a

question of credibility, not admissibility); *John Hancock Mutual Life Insurance Company v. Dutton*, 585 F.2d 1289, 1293-1294 (5th Cir. 1978) (witness allowed to testify husband did not believe his wife would really shoot him, where witness was present during altercation and her opinions were based on her direct perceptions of the event).

At first glance this may appear to be "merely" a slip and fall case in which a jury has twice decided that the restaurant on whose premises the fall occurred is not liable for Mrs. Scheerer's severe and permanent injuries. The case is, however, far more important than any surface appearance, because both of those trials were tainted by the same impermissible opinion evidence on the cause of the fall.

The first trial (*Scheerer II*) was tainted by the Hardee's incident report, because the report [Lodging at 45] was not demonstrably based on any first-hand knowledge, *see generally*, *Meder v. Everest & Jennings, Inc.*, 637 F.2d 1182 (8th Cir. 1981). The second trial (*Scheerer III*) was similarly tainted. The Eighth Circuit relied on the forced comment made by Mrs. Fann in *Scheerer II* that Mrs. Scheerer was wearing black patent

leather shoes as the supposed basis for Mrs. Fann's "first-hand knowledge." [Appendix at 8, n. 5.] In doing so the Eighth Circuit made the same Grand Canyon leap that the District Court did: *assuming without the slightest shred of evidence in the record that merely because the top of a pair of shoes is made of slick, shiny black leather that the bottoms must necessarily and as a matter of law be slick as well.*

A gross and manifest injustice has been done to the Scheerers by both the District Court and the Eighth Circuit in this matter. Granting certiorari is warranted not only because of the need to correct the injustice, but to prevent the perversion of Fed. R. Evid. 602 and 701 by allowing to stand a decision which permits a lay witness to offer an opinion about the cause of an accident after expressly testifying that she has no personal knowledge on which to base the opinion.

CONCLUSION

Although Petitioners recognize that the Court rarely grants petitions for a writ of certiorari "when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law" [Su-

preme Court Rule 10], nevertheless, under the facts and circumstances of this case, Mr. and Mrs. Scheerer have suffered a manifest injustice which this Court should address. The decision below stands alone as the sole case discovered in which a witness expressly testifies, "I have no knowledge of the underlying facts" but then gives an opinion as to the cause of an accident. And the error is particularly egregious where it is this opinion testimony which is the *only* direct testimony relied upon by Respondent to demonstrate it was not responsible for either the fall or for Mrs. Scheerer's serious and permanent injuries. The writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 97-2765

Cheryle Ann Scheerer; John Scheerer,	)	
Appellants,	)	
v.	)	Appeal from the
	)	United States District
Hardee's Food Systems, Inc.,	)	Court for the Western District of Missouri
Appellee.	)	

Submitted Feb. 12, 1998.

Decided July 9, 1998.
Rehearing and Suggestion for Rehearing En Banc Denied Aug. 14, 1998.

Before McMillian and Loken, Circuit Judges, and Bogue, [FN. 1] District Judge.

McMillian, Circuit Judge.

Cheryle Ann Scheerer and her husband, John Scheerer, (the Scheerers) appeal from a final judgment

entered in the United States District Court [FN. 2] for the Western District of Missouri, in favor of Hardee's Food Systems, Inc. (Hardee's), following a second trial in their action for damages resulting from injuries sustained by Mrs. Scheerer when she slipped and fell in the parking lot of a Hardee's restaurant in Lee's Summit, Missouri. This is the third time this case has come before us. We previously reversed the district court's grant of summary judgment for Hardee's, Scheerer v. Hardee's Food Systems, 16 F.3d 272 (8th Cir. 1994) (Scheerer I) (reversing and remanding for trial), and thereafter reversed a judgment for Hardee's following the first jury trial, Id., 92 F.3d 702 (8th Cir. 1996) (Scheerer II) (reversing and remanding for a new trial). At the second trial, the jury returned a verdict for Hardee's upon assigning 0% fault to Hardee's and 0% fault to Mrs. Scheerer. In the present appeal, the Scheerers argue that the district court (1) erred in admitting certain testimonial evidence related to the subject matter of an inadmissible document, (2) erred in instructing the jury, and (3) abused its discretion in allowing cross-examination and closing arguments which tended to impugn the Scheerers' counsel. Upon careful review, we now affirm.

Jurisdiction

This case was removed from state court to federal district court pursuant to 28 U.S.C. § 1441. Jurisdiction in the district court was proper based upon 28 U.S.C. § 1332. The notice of appeal was timely filed pursuant to Fed. R. App. P. 4(a), and we have jurisdiction over the present appeal pursuant to 28 U.S.C. § 1291.

Discussion

In Scheerer II, we held that the district court erred at the first trial in admitting into evidence as a business report an incident report prepared in anticipation of litigation by a non-witness employee of Hardee's. 92 F.3d at 705-07. The incident report contained a statement attributed to a "friend" of Mrs. Scheerer that the cause of the accident was Mrs. Scheerer's "slick shoes." Id. at 705. Prior to the second trial, the district court entered an order precluding Hardee's from mentioning the incident report at any time before or during the trial, while in the presence of the jury or potential jurors, without prior permission from the district court. At trial, counsel for Hardee's cross-examined the "friend," Mrs. Fann, about her observations while assisting Mrs. Scheerer at the time of the accident. Counsel asked the following question: "And you looked around and you said it must have been your slick shoes, didn't you?" Appellants' Appendix, Vol. 2, at 289 (trial transcript). Over the objection of counsel for the Scheerers, the district court allowed the question and admitted Mrs. Fann's answer, in which she admitted making the "slick shoes" comment. It is undisputed that the incident report was not mentioned at the second trial. Thus, all that is at issue in this appeal is Mrs. Fann's testimony about her own contemporaneous "slick shoes" comment (which had been recorded in the inadmissible report.

The Scheerers argue that the district court erred in permitting Mrs. Fann to answer the "slick shoes" question. According to the Scheerers, "Hardee's managed to get through the 'back door' (cross-examining Mrs. Fann about her purported conclusions about what caused the slip and fall) what it could not get in through the 'front door' (admission of the incident report)." Id. at 13. The

Scheerers apparently do not dispute the propositions that the hearsay rule allows a witness to testify about his or her own prior statements, Fed.R.Evid. 801(c), or that an attorney ordinarily may ask on cross-examination whether the witness previously made a particular statement under oath, Fed.R.Evid. 613. They argue, however, that--not only did Mrs. Fann never actually admit at the first trial that she had made the "slick shoes" comment--but also that there was no evidence that she had ever actually looked at the soles of Mrs. Scheerer's shoes or personally knew about them. Therefore, they contend, Mrs. Fann should not have been "forced to testify as to her opinion on an ultimate issue in this case--the cause of Mrs. Scheerer's slip and fall," because it violated Fed.R.Evid. 701 [FN. 3] and Fed.R.Evid. 602. [FN. 4] Brief for Appellants at 15-25.

To begin, although not necessarily required under Fed.R.Evid. 613, the fact of the matter is that Mrs. Fann did essentially testify at the first trial that she had made the "slick shoes" comment. [FN. 5] More importantly, Mrs. Fann's testimony regarding her own observations at the time of the accident, which Hardee's was able to elicit from her on cross-examination, was relevant to rebut through reasonable inference the Scheerers' evidence suggesting that Mrs. Scheerer slipped because of water, oil, or degreaser on the parking lot. See Fed.R.Evid. 401. Because Mrs. Fann's contemporaneous statement was rationally based on her own first-hand perceptions and reasonably would have aided the jury's understanding of a fact in issue (i.e., whether there was water, oil, or degreaser on the parking lot), it was not inadmissible under Fed.R.Evid. 602 or Fed.R.Evid. 701. Furthermore, because Mrs. Fann's contemporaneous statement

of opinion was "otherwise admissible," it was not objectionable merely because it embraced an ultimate issue to be decided by the trier of fact. See Fed.R.Evid. 704(a).

We next turn to the Scheerer's claims of instructional error at the second trial. In Scheerer II, we anticipated that some of the instructional issues raised in that appeal would recur following our remand and thus addressed them at that time. We held, among other things, that the district court did not err in instructing the jury on the issues of whether an "open and obvious" danger existed in the parking lot or whether Mrs. Scheerer failed to keep a proper lookout and therefore may be comparatively at fault. 92 F.3d at 709-10. In the present appeal, the Scheerers again argue that the district court committed reversible error in giving the same "open and obvious" instruction, the same "proper lookout" instruction, and the same comparative fault instruction. Alternatively, the Scheerers argue that the district court erred by giving those instructions together because they are logically inconsistent. The Scheerers further argue that it was reversible error for the district court to use, in Instruction No. 10, the word "accident" instead of "incident" because "accident" implies a lack of any fault, whereas "incident" does not. See Instruction No. 10 ("The mere fact that an accident happened, standing alone, does not permit the jury to draw the inference that the accident was caused by anyone's negligence.") (set forth in Addendum to Brief for Appellants at 6).

The Scheerers have made no showing that the evidence relevant to the challenged instructions was materially different at the second trial. We therefore hold that the Scheerers' legal arguments regarding In-

structions Nos. 8, 9 and 12 are foreclosed under the "law of the case" doctrine because the exact same issues were raised on appeal and were decided favorably to Hardee's in Scheerer II, 92 F.3d at 709-10. See *Bethea v. Levi Strauss & Co.*, 916 F.2d 453, 456-57 (8th Cir. 1990) (district court is bound on remand to obey, without re-examining, court of appeals' mandate in same case). As to Instruction No. 10, we simply find no merit to the Scheerers' argument. When Instruction No. 10 is read in its entirety and in conjunction with the other jury instructions, it is simply unreasonable to construe the jury charge as a whole as indicating that the jury should find no fault. *See, e.g., Dupre v. Fru-Con Eng'g, Inc.*, 112 F.3d 329, 335 (8th Cir. 1997) (when reviewing claim of instructional error, instructions are considered in their entirety to determine whether the charge, as a whole, fairly and adequately submits the issues to be tried). Accordingly, we hold that the district court did not commit reversible error in its jury instructions.

Finally, the Scheerers argue that the district court abused its discretion by allowing defense counsel to insinuate, in cross-examination of the Scheerers' witnesses and in closing argument, that the Scheerers' counsel may have suborned perjury or encouraged fabrication. In response, Hardee's maintains that defense counsel did nothing wrong in highlighting, for example, the significant changes over time in the testimony given by Mrs. Scheerer and the Scheerers' witnesses and in pointing out logical inferences to be drawn therefrom.

Notwithstanding the unflattering light that was shed upon the Scheerers' attorney, we hold that it was within the district court's discretion to permit the ques-

tions and arguments to which the Scheerers now object because they addressed matters concerning the credibility of witnesses. Moreover, the questions and arguments by lawyers are not evidence, and we assume the jury was so instructed. Finally, the arguments and inferences raised by counsel for Hardee's were certainly matters upon which counsel for the Scheerers could have responded through redirect examination and rebuttal closing argument. Thus, upon careful review, we hold that the district court did not abuse its discretion in allowing cross-examination and closing arguments which tended to impugn the Scheerers' counsel.

Conclusion

For the reasons stated, the judgment of the district court is affirmed. In addition, the motions filed by Hardee's to dismiss the present appeal as frivolous and for sanctions are denied.

FN. 1. The Honorable Andrew W. Bogue, United States District Judge for the District of South Dakota, sitting by designation.

FN. 2. The Honorable Fernando J. Gaitan, United States District Judge for the Western District of Missouri.

FN. 3. Rule 701 provides:

If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a)

rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue.

FN. 4. Rule 602 provides in relevant part:

A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may, but need not, consist of the witness' own testimony.

FN. 5. Mrs. Fann testified at the first trial as follows:

Question: "Were you the one, Miss Fann, that decided or stated after she fell that it must have been her slick shoes?" Answer: "That was the conclusion I made, the comment, the fact that she had on black patent leather shoes." Appellants' Appendix, Vol. 1, at 102 (trial transcript).

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

Cheryle Ann Scheerer *et ux.*,	)	
Plaintiffs,	)	
vs.	)	No. 91-1-43-CV-W-2
Hardee's Food Systems, Inc.,	)	
Defendant.	)	

ORDER

Plaintiffs' amended motion for new trial, filed April 14, 1997, is denied.

/s/ Fernando J. Gaitan, Jr.
United States District Judge

Dated: May 15, 1997
Kansas City, Missouri

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Cheryle Ann Scheerer *et ux.*,	)	
Appellants,	)	
vs.	)	No. 97-2765
Hardee's Food Systems, Inc.,	)	
Respondent.	)	

The petition for rehearing with suggestions for rehearing en banc is considered by the Court and denied. The petition for panel rehearing is also denied.

August 14, 1998

Order Entered at the Direction of the Court

/s/ Michael E. Gans

Clerk, United States Court of Appeals
Eighth Circuit